SUPREME COURT
MAR
MICHAEL ROD

No. 73-1447

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLARD WAGNER,

Petitioner,

vs.

JOYCE ANN WAGNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

SAMSON, FRIEBERT, SUTTON,
FINERTY & BURNS
ROBERT E. SUTTON
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. _____

WILLARD WAGNER,

Petitioner,

vs.

JOYCE ANN WAGNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of the State of Wisconsin entered on January 4, 1974.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is set out in the appendix, p. 1.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Does a natural father have a constitutional right to associate with his child?

2. If so what are the minimum due process requirements which attend a forfeiture of that right?

3. Has the petitioner been denied elementary due process in the denial of his right to associate with his child?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the First, Ninth and Fourteenth Amendments to the United States Constitution.

2. This case involves Sec. 247.37, Wis. Stats. and 42 U.S.C. Sec. 1983.

STATEMENT OF THE CASE

(The chronology of events is complicated but a full recitation of them is absolutely essential to a full understanding of the magnitude of the constitutional violations perpetrated upon the petitioner).

Willard Wagner and Joyce Ann Wagner were married on November 25, 1967 at Kenosha, Wisconsin. One child, Suzanne, was born of the marriage on July 26, 1968.

On September 23, 1970 Joyce Wagner, the respondent, petitioned a Family Court Commissioner of Racine County, Wisconsin for the issuance of an Order to Show Cause directed against Willard Wagner, the petitioner, thus commencing a divorce action. The Order to Show Cause together with a divorce summons was served upon the petitioner on September 25, 1970 and a hearing held before

the Family Court Commissioner on October 30, 1970. Nothing in the Petition or Order to Show Cause alleged that the petitioner was in jeopardy of losing visitation rights with the minor child of the parties who was then 16 months old. (App., pp. 2-8)

At the hearing on October 30, 1970 the respondent was represented by an attorney and the petitioner was not. On November 3, 1970 the Family Court Commissioner issued a temporary order which inter alia deprived the petitioner of any visitation with the minor child of the parties. (App., pp. 9-10) Subsequently many years later at the ultimate trial on the merits it was revealed that the attorney for the respondent had ex parte contact with the Court Commissioner and had furnished an unspecific affidavit by the respondent in order to support the order of the Family Court Commissioner denying visitation. (App., p. 11)

On December 4, 1970 the County Judge before whom the case was to be heard entered an order appointing a guardian ad litem for the child and ordered that the issue of visitation be heard as a contested matter and that the parties be examined by a psychiatric clinic regarding the matter of visitation. (App., pp. 17-18) Although the parties were examined no action of any kind was ever taken by the court upon the results of the examination. Another such order was entered on September 3, 1971 (App., pp. 19-20) also to no ultimate conclusion.

On January 7, 1971 the complaint of the respondent was filed. That complaint did not plead any facts for or contain any prayer regarding the denial of visitation, temporary or permanent to the petitioner. (App., pp. 12-15) An amended complaint was filed on June 19, 1973 and it also

did not challenge visitation in any respect. (App., pp. 16-18) On November 5, 1971 the trial commenced and hearings were held on November 26, December 21 and December 22, 1971. On December 24, 1971 the trial judge disqualified himself and the matter was transferred to another judge, the Hon. Richard J. Harvey, on February 8, 1972. (App. p. 20)

Trial before Judge Harvey was held on March 27, April 24, May 15, June 19, 21, 22, 29 and August 22, 23, 24, 28 and 29, 1972. Repeatedly during the proceedings both before the original trial judge and before Judge Harvey motions for visitation both temporary and permanent were denied. At the close of the trial on August 29, 1972 a motion for temporary visitation of the petitioner with his child was last made and denied. Briefs on the case were ordered submitted by the parties on or before September 25, 1972 and briefs and recommendations of the guardian ad litem were submitted on September 27, 1972. A petition for relief directed to the issue of temporary visitation was filed in the Wisconsin Supreme Court on September 19, 1972 and denied on September 28, 1972. (App., pp. 21-22)

On October 6, 1972 an action under the Civil Rights Act, 42 U.S.C. Sec. 1983 directed solely at the issue of temporary visitation was filed in the United States District Court for the Eastern District of Wisconsin. On November 10, 1972 Judge Harvey issued an Order to Show Cause why counsel for the petitioner should not be punished for contempt of the State court for filing the Civil Rights action in the federal court. A petition removing the contempt action to the federal court was filed on November 15, 1972 and a temporary stay granted on December 4,

1972. A request to reconsider the petition for temporary visitation had been presented to the Wisconsin Supreme Court on December 15, 1972 (App., pp. 22-25) and was never acted upon.

On December 22, 1972 a decision was mailed to the parties on the merits of the divorce action by Judge Harvey inter alia denying visitation to the petitioner. (App., pp. 26-40) On January 26, 1973 the United States District Court for the Eastern District of Wisconsin denied removal of the contempt and on January 29, 1973 counsel for the petitioner filed an action under 42 U.S.C. Sec. 1983 against the state trial judge in the contempt matter. On February 6, 1973 the United States District Court for the Eastern District of Wisconsin issued a temporary restraining order against the state judge in the contempt matter and since the state judge had on January 31, 1973 ordered the federal court to show cause why it should not desist the federal court had petitioned the Wisconsin Supreme Court for a Writ of Prohibition against the state court. A decision of the Wisconsin Supreme Court on the petition was entered on April 17, 1973 and is reported at 58 Wis. 2d 424, 206 N.W. 2d 428.

On February 6, 1973 the Federal District Court also dismissed the action on visitation as moot on the grounds that a decision had been rendered by the state court which was properly reviewable in the State Supreme Court. The decision of December 22, 1972 directed that the counsel for the respondent, Joyce Wagner, prepare Findings of Fact and Conclusions of law in accordance with the decision. (App., p. 38) If the December 22, 1972 decision is considered judgment (although no notice of judgment was served until May, 1973 and Sec. 247.37(b), Wis. Stats. was

never complied with) the state law provides that such findings and conclusions are to be prepared within thirty (30) days—Wis. Stats. Sec. 247.37(1)(a), however, no findings and conclusions were proposed by counsel for the respondent until April 25, 1973 (App., p. 40) and judgment was entered on May 15, 1973 with Notice of Entry of Judgment provided on May 23, 1973. (App., p. 40)

A Notice of Appeal to the Wisconsin Supreme Court was served and duly filed on August 14, 1973 and a petition to the Wisconsin Supreme Court for an extraordinary writ directed to the issue of temporary visitation was served on August 22, 1973, heard on August 28, 1973 and denied on August 30, 1973. (App., pp. 41-42) A notice for the paging of the record was entered on October 25, 1973 and the record was filed in the Wisconsin Supreme Court on October 25, 1973. (App., p. 43) A petition to the Wisconsin Supreme Court for temporary visitation pending decision on the appeal was filed on November 7, 1973, heard on November 21, 1973 and denied on November 27, 1973. (App., p. 44) On November 13, 1973 the respondent filed a Notice to Dismiss the Appeal and on January 4, 1974 the Wisconsin Supreme Court by the order challenged in this petition ordered the appeal dismissed as to all issues relating to the rights of visitation of the petitioner with his minor child. (App., p. 1)

REASONS FOR GRANTING THE WRIT

I.

A NATURAL FATHER IS ENTITLED TO ASSOCIATE WITH HIS CHILD UNDER THE 1st, 9th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The ultimate effect of the previously recited facts is that the petitioner was temporarily deprived of visitation with his minor child for the past three plus years and finally by the order chalienged here has been permanently deprived of visitation. He has also suffered a consequent and equally serious deprivation of the right to review the merits of the visitation deprivation and the due process *vel non* of accomplishing that visitation deprivation. The Wisconsin Supreme Court has been tendered the issue of four occasions—five if one includes the occasion of the petition of the United States District Court requesting a Writ of Prohibition against the state county judge—on September 19, 1972, December 15, 1972, January 31, 1973, August 22, 1973 and November 7, 1973 and on each and every occasion the Wisconsin Supreme Court has refused to review the issues of (a) the constitutional rights *vel non* of a natural father to visit his child, (b) the procedural due process to which a litigant is entitled in a divorce action before forfeiting the right of visitation and (c) the particular due process and/or the merits of the deprivation of the visitation in the specific case of Wagner v. Wagner.

Although to this date the United States Supreme Court has not identified the right of a natural parent to associate with his or her child as a right embodied in the Con-

stitution of the United States that pronouncement has been made by the lower federal court and is implicit in decisions of the United States Supreme Court. In *Mabra* v. *Schmidt*, 356 Fed. Supp. 620, Judge Doyle of the United States District Court for the Western District of Wisconsin declared:

> Freedom to associate with others is a right secured by the First and Fourteenth Amendments. N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1957). The forms of association protected by the Fourteenth Amendment are not limited to those which are "political in the customary sense," but include those which "pertain to the social, legal, and economic benefit of the members." Griswold v. Connecticut, 381 U.S. 479, 483 (1965). Specifically, constitutionally protected associations include that between wife and husband. Griswold, at 486.
>
> In Roe v. Wade, 41 Law Week 4213, 4225 (January 22, 1973), in the context of a discussion of the constitutional guarantee of personal privacy, the Supreme Court of the United States observed that included within the guarantee are "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U.S. 312, 325 (1937)," and added that the right of personal privacy "has some extension to activities relating to . . . family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944), and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, [262 U.S. 390, 399 (1923)]."
>
> I conclude that a father enjoys a right to associate with his children; that this right is guaranteed by the First Amendment as incorporated in the Fourteenth; alternatively, that this right is embodied in the concept of "liberty" as that word is used in the

due process clause of the Fourteenth Amendment; and that, whatever the constitutional provision or provisions by which it is protected, the right is fundamental.

This recognition that the rights embodied in the Constitution of the United States include that of association between parent and child can also be clearly discerned from critical language employed by Justice White in the majority opinion in *Stanley* v. *Illinois,* 92 S.Ct. 1208, 405 U.S. 645, 31 L.Ed. 2d 551:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Kovacs v. Cooper, 336 U.S. 77, 95, 93 L.Ed. 513, 527, 69 S.Ct. 448, 10 ALR 2d 608 (1949) (concurring opinion).
>
> The court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 ALR 1446 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 97 L.Ed. 1221, 1226, 73 S.Ct. 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1944). The

integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra at 399, 67 L.Ed. at 1045, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, 86 L.Ed at 1660, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 14 L.Ed. 2d 510, 522, 85 S.Ct. 1678 (1965) (Goldberg, J., concurring). 31 L.Ed. 2d at 558-559.

It is respectfully submitted that the United States Supreme Court should take this opportunity to announce the constitutional rights and protections attendant thereto of a parent to associate with his child.

II.

A PARENT IS ENTITLED TO CERTAIN ELEMENTARY DUE PROCESS PROTECTION OF HIS RIGHT TO ASSOCIATE WITH HIS CHILD.

Since the right of a father to associate with his child is embodied in the Constitution it is axiomatic that elementary due process protections are a corollary of that right. A constitutional right does not exist in a vacuum. As an essential protection of the constitutional right a citizen is entitled to procedural due process before the right can be forfeit. The essentials of such due process are legally fixed standards—that is, an articulated body of law of understandable meaning denominating under what circumstances and by what standards the right may be forfeit—notice that the right is challenged, a hearing directed to the issues and a meaningful review procedure. *Cole* v. *Arkansas,* 333 U.S. 196 (1948), *In Re Gault,* 387 U.S. 1 (1967), *Zemel* v. *Rusk,* 381 U.S. 1 (1965), *Breithaupt* v. *Abram,* 352 U.S. 432 (1957), *Baggett* v. *Bullitt,* 377 U.S. 360 (1964) and *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966).

With respect to the right of a parent to associate with a child it is respectfully submitted that where that right is to be limited or forfeit it is incumbent that standards be established, both substantive and procedural, by which to test the denial of the right. In other words before visitation be denied a father with his child he should be furnished notice that his right to associate with his child is in jeopardy, the standards which obtain to determine whether visitation shall be denied, a hearing under the standards established, findings and, if the hearing be judicial, an opportunity to obtain review of the findings. As Justice Black stated, *In re Murchison*, 349 U.S. 1 (1955):

> ". . . to perform its high function in the best way, justice must satisfy the appearance of justice."

III.

THE PETITIONER HAS BEEN DENIED ELEMENTARY DUE PROCESS OF LAW IN THE DENIAL OF VISITATION RIGHTS OF HIS CHILD.

On the facts in the case at bar it is respectfully submitted that the petitioner has been denied the essentials of due process in many fundamental respects. Principally, of course, the constitutional right involved has not been recognized during the course of the litigation. Where the right is not acknowledged there is little pretense of due process accorded that right. In the case at bar petitioner was given no formal notice that his right to associate with his child was in jeopardy and the denial of the visitation, both temporary and final, was accomplished without application of standards, findings or review. At no time have any standards been identified nor findings directed to those

standards on the issue of the forfeiture of the petitioner's right to associate with his child. As is usually the case where the legal processes refuse to recognize constitutional rights all of the accompanying due process rights are trampled.

The right of the petitioner has been violated essentially in the refusal of the legal system to consider the question. Paradoxically, the constitutional right involved has been denied without considering its existence.

CONCLUSION

For the reasons stated above certiorari should be granted.

Respectfully submitted,

SAMSON, FRIEBERT, SUTTON,
FINERTY & BURNS
ROBERT E. SUTTON
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
Attorneys for the Petitioner

APPENDIX

APPENDIX

APPENDIX

OPINION OF SUPREME COURT OF WISCONSIN

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Robert O. Uehling
Clerk

Madison, January 4, 1974

Kolbe, Sharp & Arena
To 212 Fifth Street
Racine, WI 53403

Samson, Friebert, Sutton & Finerty
710 North Plankinton Avenue
Milwaukee, WI 53203

Helm, Myers, Gillett & Christensen
727 Wisconsin Avenue
Racine, WI 53403

Sir:—The Court today announced decision in your case as follows:

No. 463 *Joyce Ann Wagner* v. *Willard Dale Wagner*

The motion of plaintiff-respondent to dismiss the appeal having been considered by the court, and the court having determined that judgment was granted in this case on December 22, 1972, although not entered until May 15, 1973,

IT IS ORDERED that the appeal insofar as it seeks review of paragraphs 3, 7, and 12 of the judgment entered on May 15, 1973, providing respectively for support pay-

ments, fees of the guardian *ad litem,* and yearly payments to the clerk of circuit court, is timely. In all other respects the appeal is dismissed. No costs to be taxed.

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court.

(236 E4)

SUMMONS, PETITION AND ORDER TO SHOW CAUSE

SUMMONS

STATE OF WISCONSIN
COUNTY COURT RACINE COUNTY
FAMILY COURT BRANCH

Joyce Ann Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Plaintiff,

vs.

Willard Dale Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Defendant.

THE STATE OF WISCONSIN, to the said defendant:

YOU ARE HEREBY SUMMONED AND REQUIRED to serve upon James J. Fetek, plaintiff's attorney, whose address is 1630 Douglas Avenue, Racine, Wisconsin, an answer or other pleading to the complaint for divorce within twenty (20) days after such complaint is served upon you. In the absence of a court order to the contrary, service of such complaint upon you shall be delayed for sixty (60) days after service of this summons. If no copy of

the complaint is served upon you after such sixty (60) days have passed, you may in the next twenty (20) days thereafter demand in writing of the plaintiff's attorney a copy of the complaint. If you fail to answer or defend the above entitled action in the Court aforesaid, judgment will be rendered against you according to the demand of the complaint.

JAMES J. FETEK
Attorney for Plaintiff.

P. O. ADDRESS
1630 Douglas Avenue
Racine, Wisconsin
APPROVED:
/s/ *Joyce Ann Wagner*
JOYCE ANN WAGNER

PETITION

STATE OF WISCONSIN
COUNT COURT RACINE COUNTY
FAMILY COURT BRANCH

Joyce Ann Wagner, 5000 Graceland Blvd., Apt. 233
Racine, Wisconsin,

Plaintiff,

vs.

Willard Dale Wagner, 5000 Graceland Blvd., Apt. 233
Racine, Wisconsin,

Defendant.

Now comes Joyce Ann Wagner, the plaintiff above named, and respectfully shows unto the Court as follows:

FIRST: That your petitioner is the plaintiff in the above entitled action and her husband, Willard Dale Wagner, is the defendant therein; and that said action is an action for absolute divorce.

SECOND: That the parties hereto have one (1) minor child and that the plaintiff is a fit and proper person to have the custody of the said child during the pendency of this action.

THIRD: That the plaintiff verily believes that it is improper for the defendant to reside in the premises occupied by her.

FOURTH: That the plaintiff does not have sufficient funds with which to support herself and the said minor child during the pendency of this action.

FIFTH: That the plaintiff believes that the defendant is likely to interfere with her personal liberty, her custody of the minor child and come upon the premises occupied by her as a private dwelling unless restrained by an order of this Court.

SIXTH: That the plaintiff believes the defendant is likely to encumber or dispose of his property or remove same out of the state unless restrained by an order of this Court.

WHEREFORE, plaintiff prays that the Court enter an Order requiring the defendant to appear and show cause;

Why the plaintiff should not be awarded the care, custody and control of the minor child of the parties during the pendency of this action.

Why the defendant should not be restrained from disposing of or encumbering any of the property of the parties during the pendency of this action.

Why the defendant should not be restrained from interfering with the personal liberty of the plaintiff during the pendency of this action.

Petition

Why the defendant should not be restrained from incurring liability by and with pledging the credit of the plaintiff for said liability.

Why the defendant should not be required to pay the attorney fees to be incurred by the plaintiff in this action.

Plaintiff further prays that the Court forthwith enter a temporary order restraining the defendant from interfering with the personal liberty of the plaintiff and from going upon the premises occupied by the plaintiff, and from disposing of or encumbering any property of the parties pending the hearing on said Order to Show Cause.

Dated at Racine, Wisconsin, this 23rd day of September, 1970.

/s/ *Joyce Ann Wagner*
JOYCE ANN WAGNER

STATE OF WISCONSIN)
) ss.
COUNTY OF RACINE)

Joyce Ann Wagner, being first duly sworn on oath, deposes and says that she is the plaintiff and petitioner in the above entitled action, that she has read the foregoing Petition and knows the contents thereof, and that the same is true to her own knowledge, except as to those matters therein alleged on information and belief, and as to those matters she believes it to be true.

/s/ *Joyce Ann Wagner*
JOYCE ANN WAGNER

Subscribed and sworn to before
me this 23rd day of September,
1970.
/s/ *James J. Fetek*
James J. Fetek
Notary Public, Racine County, Wis.
My Commission Is Permanent.

Order to Show Cause and Restraining Order

ORDER TO SHOW CAUSE AND RESTRAINING ORDER

STATE OF WISCONSIN
COUNTY COURT RACINE COUNTY
FAMILY COURT BRANCH

Joyce Ann Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Plaintiff,

vs.

Willard Dale Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Defendant.

IT IS ORDERED, that the defendant, Willard Dale Wagner, show cause before me, the undersigned, Harold R. Sheets, the Family Court Commissioner for Racine County, Wisconsin, at the first floor hearing room in the Racine County Courthouse, 730 Wisconsin Avenue, Racine, Wisconsin on the 28th day of October, at 1:45 o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard;

Why the plaintiff should not be awarded the care, custody and control of the minor child of the parties during the pendency of this action.

Why the defendant should not be required to pay a reasonable sum weekly as temporary alimony and for the support and maintenance of the minor child of the parties during the pendency of this action;

Why the defendant should not be required to pay the attorney fees to be incurred by the plaintiff in this action.

Order to Show Cause and Restraining Order

Why the defendant should not be restrained from incurring any liability by and with pledging the credit of the plaintiff for said liability.

Why the defendant should not be restrained and enjoined from interfering with the personal liberty of the plaintiff and from going upon the premises occupied by the plaintiff, and from disposing of or encumbering any of the property of the parties during the pendency of this action.

IT IS FURTHER ORDERED that pending the hearing upon this Order to Show Cause the defendant shall be and he hereby is restrained and enjoined from interfering with the personal liberty of the plaintiff, and from cashing, disposing or converting to his exclusive use of any money, funds, property or wages coming into his possession.

IT IS FURTHER ORDERED that pending the hearing on the Order to Show Cause the defendant shall forthwith and immediately vacate and remove from apartment No. 233 of the parties at 5000 Graceland Blvd., Racine, Wisconsin, and that the plaintiff is awarded the exclusive possession hereof pending the hearing upon this Order to Show Cause.

IT IS FURTHER ORDERED that the defendant shall produce a wage statement from his employer for eight (8) weeks immediately preceding the hearing upon this Order to Show Cause.

IT IS FURTHER ORDERED that the defendant be restrained from incurring any liability by and with pledging the credit of the plaintiff for said liability.

Temporary Order

IT IS FURTHER ORDERED that a copy of this Order, together with a copy of the annexed Petition be served upon the defendant at least 48 hours before the time fixed for hearing.

Dated at Racine, Wisconsin, this 23rd day of September, 1970.

/s/ Harold R. Sheets
Family Court Commissioner for
Racine County, Wisconsin

TEMPORARY ORDER

STATE OF WISCONSIN
COUNTY COURT RACINE COUNTY
FAMILY COURT BRANCH

Joyce Ann Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Plaintiff,

vs.

Willard Dale Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Defendant.

The Order to Show Cause in the above entitled action dated September 23, 1970, having duly come on for hearing before the Honorable Harold R. Sheets, Family Court Commissioner for Racine County, Wisconsin, on the 30th day of October, 1970; the plaintiff appearing in person and by James J. Fetek, her attorney, and the defendant appearing in person without counsel;

Upon the testimony of the parties and upon the record and file herein;

Temporary Order

IT IS ORDERED that during the pendency of this action and until the further order of the Court, the defendant shall pay the sum of Eighty and No/100 ($80.00) Dollars per week for the temporary support of the plaintiff and the minor child of the parties. Said payments shall commence on Friday, November 6, 1970, and shall be made each Friday thereafter to the Office of the Clerk of the County Court, Family Court Branch for Racine County, Wisconsin.

IT IS FURTHER ORDERED, that the defendant shall pay the November rental due upon the apartment presently occupied by the plaintiff and shall maintain in full force and effect the existing hospitalization insurance of the parties.

IT IS FURTHER ORDERED, that the defendant shall pay to James J. Fetek, attorney for the plaintiff, the sum of $480.00 to be applied toward the attorney fees and costs of the plaintiff in this action. Said amount shall be paid in monthly installments of $50.00 commencing on November 6, 1970, and shall thereafter be paid upon the first Friday of each month.

IT IS FURTHER ORDERED, that during the pendency of this action and until the further order of the Court, the care, custody and control of the minor child of the parties shall be awarded to the plaintiff without visitation rights of the defendant.

IT IS FURTHER ORDERED, that during the pendency of this action said parties and each of them shall be and they hereby are restrained and enjoined from transferring, mortgaging, selling or disposing of any of their property, real or personal, and the defendant is

further hereby restrained and enjoined from interfering with the personal liberty of the plaintiff and her custody of the minor child of the parties, and from coming upon the premises occupied by the plaintiff as a dwelling.

HEREOF FAIL NOT UPON PENALTY OF CONTEMPT.

Dated this 3rd Day of November, 1970.

BY THE COURT,

/s/ *Harold R. Sheets*

Family Court Commissioner for
Racine County, Wisconsin

AFFIDAVIT

STATE OF WISCONSIN

COUNTY COURT RACINE COUNTY

FAMILY COURT BRANCH

Joyce Ann Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Plaintiff,

vs.

Willard Dale Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Defendant.

STATE OF WISCONSIN)
) ss.
COUNTY OF RACINE)

JOYCE ANN WAGNER, being first duly sworn on oath, deposes and says:

That your affiant is the plaintiff in the above entitled action;

That the defendant in the above entitled action, Willard Dale Wagner, has abused the minor child of the parties on numerous occasions in the presence of your affiant;

That, upon information and belief, any visitation rights granted to the defendant would be detrimental to the best interest of said child.

Dated at Racine, Wisconsin, this ..... day of November, 1970.

....
JOYCE ANN WAGNER

Subscribed and sworn to before
me this ..... day of November, 1970.

.....
James J. Fetek
Notary Public, Racine County, Wis.
My Commission Is Permanent.

COMPLAINT

STATE OF WISCONSIN
COUNTY COURT RACINE COUNTY
FAMILY COURT BRANCH

Joyce Ann Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Plaintiff,

vs.

Willard Dale Wagner, 5000 Graceland Blvd., Apt. 233 Racine, Wisconsin,

Defendant.

Now comes the plaintiff above named by James J. Fetek, her attorney, and for her cause of action against the above named defendant respectfully alleges and shows unto the Court as follows:

FIRST: That the plaintiff, age 35, resides at 5000 Graceland Boulevard in the Town of Mt. Pleasant, Racine County, Wisconsin, and is a housewife by occupation.

SECOND: That the defendant, age 47, upon information and belief, resides at 5828 Douglas Avenue in the Town of Caledonia, Racine County, Wisconsin, and is by occupation a sales representative presently unemployed.

THIRD: That the parties to this action were married at Kenosha, Wisconsin on November 25, 1967, and ever since have been and now are husband and wife.

FOURTH: That one (1) child has been born of the marriage of the parties, to-wit:

Susanne Dayle Wagner—Born July 26, 1968

FIFTH: That the parties have been bona fide residents of the County of Racine, State of Wisconsin for more than two years next preceeding the commencement of this action.

SIXTH: That no other action for divorce, legal separation or annulment of marriage is now pending between the parties before this or any other Court or judge thereof in this state or elsewhere.

SEVENTH: That the parties possess the following described property, to-wit:

A) Household furniture and furnishings.

B) A 1966 Sunbeam automobile in the name of the plaintiff.

C) A 1967 Volkswagon automobile in the name of the defendant.

D) An undivided one-half (½) interest of the plaintiff in approximately 30 acres of undeveloped real estate located in the Town of Caledonia, Racine, County, Wisconsin, which real estate is subject to a mortgage to the North Side Bank of Racine, Wisconsin.

E) 80 acres of undeveloped real estate located in the County of Jackson, State of Minnesota, in the name of the defendant, which real estate was sold by contract for deed on January 12, 1968, to one Ray C. Wagner, a brother of the defendant.

F) An undetermined amount of cash or savings accounts in the possession of, or under the control of, the defendant.

G) A checking account of the plaintiff in the Security National Bank of Racine, Wisconsin in a nominal amount.

H) A checking account of the defendant in the First National Bank and Trust Company of Racine in a nominal amount.

EIGHTH: That the defendant has been guilty of cruel and inhuman treatment toward the plaintiff as set forth in Section 247.07 (4) of the Wisconsin Statutes.

NINTH: That the plaintiff is a fit and proper person to have the care and custody and control of the minor child of the parties.

Wherefore, the plaintiff prays judgment as follows:

FIRST: That she be granted an absolute divorce from the bonds of matrimony.

SECOND: That she be awarded exclusive care, custody and control of the minor child of the parties.

THIRD: That she be granted alimony and such division of the estate of the parties as may be just and equitable.

FOURTH: That she receive such other and further relief as may be just and equitable.

JAMES J. FETEK
Attorney for Plaintiff.

STATE OF WISCONSIN)
) ss.
COUNTY OF RACINE)

JOYCE ANN WAGNER, being first duly sworn on oath, deposes and says that she is the plaintiff in the above entitled action, that she has read the foregoing Complaint and knows the contents thereof, and that the same is true to her own knowledge, except as to those matters therein alleged on information and belief, and as to those matters she believes it to be true.

/s/ Joyce Ann Wagner
JOYCE ANN WAGNER

Subscribed and sworn to before me
this 18th day of December, 1970.
James J. Fetek
James J. Fetek
Notary Public, Racine County, Wis.
My Commission Is Permanent.

Amended Complaint

AMENDED COMPLAINT

STATE OF WISCONSIN RACINE COUNTY
COUNTY COURT — FAMILY COURT BRANCH

JOYCE ANN WAGNER,

Plaintiff,

vs.

WILLARD DALE WAGNER,

Defendant.

Now comes the Plaintiff above named by DUANE L. ARENA, her attorney, and for her cause of action against the above named Defendant, respectfully alleges and shows unto the Court as follows:

FIRST: That the Plaintiff, age 35, resides at 5000 Graceland Boulevard in the Town of Mt. Pleasant, Racine County, Wisconsin, and is a housewife by occupation.

SECOND: That the Defendant, age 47, upon information and belief, resides at 5828 Douglas Avenue in the Town of Caledonia, Racine County, Wisconsin, and is by occupation a sales representative presently unemployed.

THIRD: That the parties to this action were married in Kenosha, Wisconsin on November 25, 1967 and ever since have been and now are husband and wife.

FOURTH: That one (1) child has been born of the marriage of parties, to-wit:

Suzanne Dayle Wagner
born: July 26, 1968

FIFTH: That the parties have been bona fide resident of the County of Racine, State of Wisconsin for more than two (2) years next preceding the commencement of this action.

SIXTH: That no other action for divorce, legal separation or annulment of marriage is now pending between the parties before this or any other Court or Judge thereof in this State or elsewhere.

SEVENTH: That the Defendant has been guilty of cruel and inhuman treatment toward the Plaintiff as set forth in Section 247.07(4) of the Wisconsin Statutes and that the parties have voluntarily lived entirely apart in excess of one (1) year contrary to Section 247.07(6) of the Wisconsin Statutes.

EIGHTH: That the Plaintiff is a fit and proper person to have the care, custody and control of the minor child of the parties.

WHEREFORE: the Plaintiff prays judgment as follows:

1. That she be granted an absolute divorce from the bonds of matrimony
2. That she be awarded exclusive care, custody and control of the minor child of the parties.
3. That she be granted alimony and such division of the estate of the parties as may be just and equitable
4. That she receive such other and further relief as may be just and equitable

DUANE L. ARENA
Attorney for Plaintiff

Order

STATE OF WISCONSIN)
* SS
COUNTY OF RACINE)

JOYCE ANN WAGNER, being first duly sworn, on oath deposes and says that she is the Plaintiff in the above entitled action; that she has read the foregoing Amended Complaint and knows the contents thereof and that the same is true to her own knowledge, except as to those matters therein alleged on information and belief, and as to those matters she believes it to be true.

/s/ .....
Joyce Ann Wagner

Subscribed and sworn to before me this
19 day of June, 1972.
/s/ *Duane Arena*
Notary Public-Racine County, Wisconsin
My Commission Is Permanent.

ORDER

November 24, 1970

STATE OF WISCONSIN RACINE COUNTY
COUNTY COURT — FAMILY COURT BRANCH

Joyce Ann Wagner, 5000 Graceland Blvd., Apt. 233
Racine, Wisconsin,

Plaintiff.

vs.

Willard Dale Wagner, 5000 Graceland Blvd., Apt. 233
Racine, Wisconsin,

Defendant.

The Order to Show Cause in the above entitled action having come on for hearing before the Court on the 24th day of November, 1970; the plaintiff appearing in person and by James J. Fetek, her attorney, and the defendant

appearing in person and by Elisherra Schwartz, his attorney;

Now Therefore, on motion of James J. Fetek, attorney for the plaintiff, and based upon the oral stipulation of the parties and the file herein;

IT IS ORDERED that the support payments required of the defendant shall be reduced to the sum of $70.00 per week commencing Friday, November 27, 1970; provided, however, that the existing support arrearages in the amount of $160.00 shall be fully paid by the defendant on or before December 8, 1970, and that the temporary support required of the defendant shall be reviewable by the Court upon employment of the defendant during the pendency of this action;

It Is Further Ordered that the issue relating to visitation rights of the defendant shall be heard by the Court as a contested matter;

It Is Further Ordered that Einer Christensen, an attorney of this Court, is hereby appointed as guardian ad litem for Suzanne Dayle Wagner, the minor child of the parties, during the pendency of this action;

It Is Further Ordered that the parties to this action shall be interviewed by and examined by the Racine County Mental Health Clinic prior to the scheduling of the hearing upon visitation rights of the defendant.

Dated this 4th day of December, 1970.

BY THE COURT,

/s/ John C. Ahlgrimm

Judge.

Order

CONSENT TO ACT

I hereby accept the above appointment and will discharge the duties thereof to the best of my ability.

Dated this 7th day of December, 1970.

/s/ *Einer Christensen*
EINER CHRISTENSEN

August 31, 1971

STATE OF WISCONSIN RACINE COUNTY
COUNTY COURT
FAMILY COURT BRANCH

JOYCE ANN WAGNER,

Plaintiff,

vs.

WILLARD DALE WAGNER,

Defendant.

The above entitled matter having come for hearing before the undersigned, on the 31st day of August, 1971; the plaintiff appearing by her attorney, Duane Arena, and the defendant appearing in person and with his attorney, Robert P. Goodman; and having heard the statements of counsel,

IT IS ORDERED:

FIRST. That Robert P. Goodman be substituted as attorney for the defendant in the above entitled action.

SECOND. That the Schroeder Clinic, 500 Walton Avenue, Racine, Wisconsin, is appointed to examine the plaintiff and defendant with respect to the question of visita-

tion by the defendant with the minor child of the parties and said clinic shall submit its report to the Court with copies to counsel for the plaintiff and defendant at the earliest opportunity and that both the plaintiff and defendant shall present themselves for examination at such times as the Schroeder Clinic shall designate.

THIRD. That the question of delinquency in the support account and visitation by the defendant with the minor child of the parties shall be determined at a hearing to be set by the Clerk of this Court with notice to both parties.

Dated at Racine, Wisconsin, this 3rd day of September, 1971.

By the Court.

/s/ John Ahlgrimm
Judge

ASSIGNMENT OF ACTION

STATE OF WISCONSIN COUNTY OF RACINE
COUNTY COURT

JOYCE A. WAGNER,

Plaintiff,

vs.

WILLARD D. WAGNER,

Defendant.

The above entitled matter having been filed in County Court Branch IV and the Defendant having asked for a Change of Venue due to the prejudice of the Judge of County Court Branch IV and the file having been referred to the Clerk of the Circuit Court:

The above entitled action has been assigned, pursuant to Chapter 253.18(4) of the Wisconsin Statutes, to the Judge of County Court Branch III, the Honorable Judge Richard G. Harvey, Jr.

I certify that the attached documents are all of the original documents which were referred to me and this certification was made for the purpose of transmitting the papers to County Court Branch III of Racine County.

WITNESS my signature and official seal on this 8th day of February, 1972.

cc: Duane Arena
cc: Robert E. Sutton
Einar Christensen

/s/ *Edw. F. Daley*
Edw. F. Daley
Clerk of Circuit Court

PETITION FOR RELIEF

August Term, 1972

STATE OF WISCONSIN IN SUPREME COURT

Filed Sep. 28, 1972

WILLARD WAGNER,

Petitioner,

vs.

COUNTY COURT OF RACINE COUNTY, BRANCH 4, RICHARD C. HARVEY, Judge and JOYCE ANN WAGNER,

Respondents.

PER CURIAM. A petition by Willard Wagner has been filed for leave to commence an original action for habeas corpus, mandamus, or other relief, which would raise primarily the question of whether or not Willard Wagner may visit his daughter Suzanne Wagner. It appears a divorce action is pending involving the petitioner

and his wife Joyce Ann Vargo Wagner and has been pending since September 25, 1970. During this two-year period, the petitioner has been substantially denied visitation rights with his child. The merits of the case were heard on August 29, 1972, by the Honorable Richard C. Harvey, County Judge, of Branch 4, of the County Court of Racine County, and are now under consideration by the said Judge Harvey. The parties are to file briefs by September 25, 1972.

Under the usual procedure, this matter should be decided by Judge Harvey within 60 days from September 25, 1972, and until the expiration of such time this court does not believe it advisable to entertain an action to determine what the trial court has under advisement.

The petition for leave to commence an original action of habeas corpus, mandamus, or for other appropriate relief is therefore denied.

REQUEST TO RECONSIDER PETITION FOR TEMPORARY VISITATION

December 15, 1972

Honorable E. Harold Hallows
Chief Justice—Supreme Court
State Capitol Building
Madison, Wisconsin 53702

Re: Wagner v. County Court of Racine County, et al

Dear Justice Hallows:

In September of 1972, Attorney Robert Sutton presented a petition for leave to commence an original action in the Wisconsin Supreme Court in the above captioned case on behalf of his client, Willard Wagner. The petition

for leave to commence the action was denied by the court by an order dated September 28, 1972. The order of the court states the following:

> "Under the usual procedure this matter should be decided by Judge Harvey within 60 days from September 25, 1972, and until the expiration of such time this court does not believe it advisable to entertain an action to determine what the trial court has under advisement."

The purpose of this lawsuit was to obtain visitation rights which had been denied the petitioner during the period of the divorce litigation and which rights are continuing to be denied to the petitioner until the case is decided.

Subsequent to the decision of the Wisconsin Supreme Court, Attorney Sutton commenced an action in the United States District Court for the Eastern District of Wisconsin entitled *Wagner* v. *County Court of Racine County, et al,* 72-C-556. In that case, Mr. Wagner sought essentially the same relief for visitation rights which had been denied him throughout the period of the litigation and continues to be denied to him. A motion for a Temporary Restraining Order in the federal court is currently being considered by Judge Reynolds.

Judge Harvey responded to this federal action by ordering Attorney Sutton to show cause why he should not be held in contempt. The affidavit executed by Judge Harvey states, among other things, the following:

> "That the conduct of Attorney Sutton in commencing this action [in the federal court] in the name of his client, Willard Dale Wagner, represents a clear violation of the Code of Professional Responsibility and, in particular, Section EC 7-36 of said Code as stated in 43 W.2d."

Request to Reconsider Petition

On November 15, 1972, the contempt proceeding against Attorney Sutton was removed to the federal court. That case is entitled *Wagner* v. *Wagner,* 72-C-626. Enclosed is a copy of the Notice and the Petition for Removal which contains Judge Harvey's Order and affidavit. Judge Harvey continued to pursue the contempt against Attorney Sutton despite its having been removed to federal court. Judge Robert Tehan ordered Judge Harvey to show cause why he should not be restrained from further proceeding in the contempt matter due to the contempt matter having been removed. In response, Judge Harvey ordered Judge Tehan to show cause why he should not be restrained from further activity. A hearing was held before Judge Tehan on December 4, 1972 and at the conclusion of the hearing, Judge Tehan restrained Judge Harvey from further proceedings in the contempt aspect of the case. A copy of Judge Tehan's order is enclosed.

That afternoon, Judge Harvey adjourned further proceedings as appears by the transcript which is enclosed. I then inquired of Judge Harvey by letter dated December 6, 1972 whether the entire matter was adjourned since it was our understanding that the only matter removed to federal court was the contempt aspect of the case. We also objected to any adjournment of the issues involving the divorce litigation which were under advisement. A copy of my letter of December 6, 1972 is enclosed. By a letter dated December 7, 1972, Corporation Counsel Flynn responded with the statement that all of the proceedings in the Wagner case were adjourned.

We are thus faced with the prospect of further delay in the resolution of the divorce issues and in particular the issue involving visitation rights. I should point out that the purpose in filing the original action in the Wisconsin

Supreme Court and subsequently before Judge Reynolds was to obtain interim review of the temporary order preventing visitation which remained in effect until the merits of the case in chief were resolved.

We are now beyond 60 days from September 25, 1972 and the case remains undecided and Willard Wagner remains without visitation rights due to the temporary order in the case. We therefore ask the court to reconsider the petition which has previously been presented and to grant Willard Wagner leave to commence the original action which had previously been denied.

Very truly yours,

SAMSON, FRIEBERT,
SUTTON & FINERTY
ROBERT H. FRIEBERT

RHF:pap
Encs.
cc: Hon. Horace Wilkie
Hon. Bruce F. Beilfuss
Hon. Nathan S. Heffernan
Hon. Leo B. Hanley
Hon. Connor T. Hansen
Hon. Robert W. Hansen
Hon. Robert E. Tehan
Hon. John W. Reynolds
Hon. Richard G. Harvey
Mr. Duane L. Arena
Mr. Einer Christensen
Mr. Dennis Flynn

Decision

DECISION

STATE OF WISCONSIN RACINE COUNTY
COUNTY COURT
BRANCH 4

JOYCE ANN WAGNER,

Plaintiff,

vs.

WILLARD DALE WAGNER,

Defendant.

This action was commenced September 25, 1970, by service of a Summons, Petition and Order to Show Cause. There was a hearing on the Petition and Order to Show Cause on October 30, 1970 and a Temporary Order was issued by the Family Court Commissioner for temporary support, attorney fees, and custody. No visitation was provided for the defendant in this order, under circumstances that will be discussed later in this opinion. The defendant did not secure counsel until sometime after the commencement of the action. There were numerous motions in this case because of depositions, psychiatric and psychological examinations, and requests for visitation rights on the part of the defendant, Wagner. The plaintiff served a Complaint on January 7, 1971, and the defendant served an Answer and Counterclaim May 26, 1971, which was filed December 21, 1971. The case was partially tried before the Honorable John Ahlgrimm, Judge of County Court Branch 4, who has been assigned to try Family Court matters by the County Courts of Racine County, Wisconsin. Judge Ahlgrimm heard four days of testimony, November 5, November 22, December 21, and December 22,

Decision

1971. On January 24, 1972, Judge Ahlgrimm disqualified himself, making the following statement:

> "Prior to todays adjourned trial date, and subsequent to the last trial date, this Judge, presiding herein, has been named as a party defendant in two civil proceedings, one in the Federal Court and one in the Circuit Court. The law firm representing the plaintiff in each of these actions is the same law firm which represents the defendant in the proceedings before this court today."

The Court explained the reasons for his decision, and concluded by stating:

> "Therefore, I am requesting that another judge be assigned to this case upon the Court's own motion; that an order be entered that this judge be disqualified for cause and interest; that all present orders which the Court has entered in respect to this present case shall remain in full force and effect until such time that another judge be assigned, it can be heard."

This case was subsequently assigned to this Court. This Court held pretrial conferences and hearings on motions on March 27, April 24, and May 15, 1972, and proceeded with the trial June 19, 20, 21st, 22, 28, 29 and August 22, 23, 24, 28, and 29. Briefs were submitted by all parties on or prior to September 25th, as requested by the Court.

Attorney Einer Christensen was appointed as guardian ad litem for Susan Wagner, the minor child of the parties because of an accusation of serious misconduct on the part of the defendant toward Susan, and to represent her interests and protect her rights. Mr. Christensen has participated in the trial in such capacity. It was obviously necessary that the record of the testimony taken during the four trial days before Judge Ahlgrimm be transcribed in

order that the writer of this opinion could have this portion of the record before him. The defendant asked that visitation be granted to the defendant during the pendancy of the action, and renewed his request at the close of the trial. The plaintiff asked that the defendant be punished for contempt of Court for failure to pay support money as ordered under the temporary order of the Family Court Commissioner, and by an order amending this temporary order made by Judge Ahlgrimm. This Court refused to disturb the proceedings previously made by the Family Court Commissioner and Judge Ahlgrimm, for the reason that this could not properly be done without a knowledge of the entire record. The Court, likewise, refused to rule on the question of contempt, although the Court did make a finding as to the amount of the arrearage of the defendant as of November 29, 1972, in the amount of $3340.00.

The grounds relied upon by the plaintiff for her divorce were cruel and inhuman treatment, and the grounds relied upon for the defendant in his Counterclaim were likewise cruel and inhuman treatment.

Subsequent to the amendment to the divorce law, and after the case had been assigned to this Court, the plaintiff amended the Complaint to allege two and a half years of voluntary separation, and to ask for divorce on this ground.

Subsequent to the matter being taken under advisement by the Court on September 25th, the defendant commenced some type of proceeding in the Supreme Court, seeking leave to commence an action for some type of compulsive action against the Judge of this Court, which was denied by the Supreme Court. The exact nature of this action is unknown to the writer of this opinion, and the existence

of this proceeding was not disclosed until a hearing before the Federal Court, which will be mentioned later. On October 11th, the defendant commenced an action in the U.S. District Court, making the Judge of this Court a party defendant, seeking to have the Federal Court adjudicate the question of visitation, a question then "sub judice" as part of this action. This Court then cited defense counsel, Robert Sutton, for contempt of Court for so doing. The said Sutton then retaliated by seeking to have the contempt proceeding removed to Federal Court and subsequent to that action, prepared an Order to Show Cause requiring the writer of this opinion to appear in the U.S. District Court before the Honorable Robert Tehan on a request for stay of proceedings in the contempt matter. This maneuver interrupted this Court's business, with a full arraignment calendar, scheduled at the same time as the hearing in Federal Court. This Court felt, and feels, that the Federal Court action, and the removal, or purported removal, of the contempt proceedings to the Federal Court, are entirely improper, and unconstitutional. They represent additional events in what appears to be a calculated course of harassment of this Court, and the Judge thereof. The contempt matter involving Robert Sutton, and the contempt matter involving the defendant, Wagner, are not dealt with in this decision, and will be the subject of further proceedings which will be scheduled in due course.

The Court finds that the plaintiff is entitled to a decree of divorce upon the grounds of cruel and inhuman treatment practised by the defendant to and toward the plaintiff. The Court further finds the plaintiff to be entitled to a divorce upon the grounds of voluntary separation, the same being the additional grounds for divorce alleged in the

amended Complaint. The Court finds that the plaintiff is a fit and proper person for the custody of Susan, the minor child of the parties, and the custody of this child is awarded to her. The Court finds that the defendant, Willard Wagner, is not a fit and proper person to have the custody of the minor child of the parties. The Court finds that the defendant is not entitled to any of the relief prayed for in his Counterclaim, and that the allegations contained therein have not been proven.

The acts of cruel and inhuman treatment by the defendant against the plaintiff were mostly performed, as is usually the case, when only the two parties were present, but there is solid corroboration of cruelty on the part of the defendant toward the plaintiff in that when he returned from a trip to Central America he admits he told her of his sexual conquest of a call girl, or prostitute, and also engendered in her a fear he had brought home venereal disease, to such an extent she consulted her physician to have tests made as to whether or not she had contracted venereal disease from the defendant.

Additional corroboration of cruel treatment toward the plaintiff by the defendant is furnished from the fact that the defendant admitted that he had repeatedly asked the plaintiff to have an abortion performed, knowing that this was contrary to her religion, and that this caused her great anguish and was most offensive to her.

The defendant undermined his marriage by harping on the subject of abortion, a proposal he knew to be offensive to her. His accounts of his adventures with a call girl in Costa Rica represent a piece of calculated cruelty, a most effective way to wound the self esteem of a wife. The creation of the fear of venereal disease in his wife shows

the ingenuity of defendant's capacity for cruelty, but not its limits, as will be discussed in regard to his relations with his daughter.

The big issue in this case is involved over the subject of visitation of the child by the defendant. The plaintiff has made detailed accusations that the defendant engaged in the most loathsome type of behavior toward his infant daughter, commencing at the age of two months. These accusations were of such a nature that they would shock the most calloused conscience. The big question is whether or not these acts were in fact committed.

There is no direct corroboration of the charges. Both parties submitted to lie detector tests, upon stipulation, and the plaintiff passed her test. The defendant had one inconclusive test, and two that he passed. The Psycho-galvanometer word association test, administered to the child, indicated some corroboration. Both parties were examined by psychiatrists and psychologists who have given their opinions.

In reaching a decision on this subject, I have had the benefit of observing the actions and general demeanor of the parties in eleven court sessions. I am satisfied that Mr. Wagner did not suffer hallucinations or delusions. I am satisfied that a substantial portion of the acts she complained of in the defendant, occurred. By this I mean that the defendant engaged in acts toward the daughter in which he consciously and deliberately created the illusion that he was committing abnormal sexual acts toward his daughter, and that his motivation was to wound and hurt the plaintiff, in retaliation for feelings of frustration for which he blamed her. Both Dr. Bacon, a witness for the

plaintiff, and Dr. Geist, a witness for the defendant, hint that this is an explanation of the situation. After careful observation of the parties, and considering the evidence of the entire case as a whole, this is my finding as to what happened between the defendant and his daughter. I do not find that he is a pedophiliac or sexual pervert within the commonly accepted meaning of the term.

There must be discussion of the fact that the plaintiff did not report the siutations between the defendant and the child to anyone for a considerable period of time after they occurred. She did not even tell her own attorney, Mr. Fetek, until the second visit with him. Her first conference had been to draft a will before she submitted to surgery, and while she seemed disturbed, and the question of the custody of the child in the event of her death was plainly on her mind, she did not disclose the activities of her husband until later on. While Mrs. Wagner consulted Dr. Coffey about the fear of venereal disease engendered in her by the comments of the defendant, she did not tell him about the situation, nor did she tell Dr. Graf of the episode concerning the neck. I may say that in this episode I doubt that the defendant injured the child as Mrs. Wagner claimed, and I find that this allegation has not been proven.

Mrs. Wagner wrote some very affectionate letters to the defendant while he was in Greece, which appear to be entirely inconsistent with the fact that the defendant had been behaving as she had described, both toward her, and toward the child. However, the events of her marriage were of such a nature she naturally shrank from revealing them to anyone, and she certainly is not the first woman or the millionth woman in the world who has prolonged a

wrecked marriage in the hope that her love, or the children, might mend a situation which was incapable of being mended.

While her behavior in this respect is difficult to understand, I find it extremely difficult to understand how the defendant could make the bizarre "Proposal of Settlement" to the general effect that he would surrender custody of his daughter providing Judge Ahlgrimm, the guardian ad litem, Einer Christensen, and the attorney for the plaintiff, Mr. Arena, would pay him damages in the amount of $26,000 which was to be used to establish a trust fund for Susan. Not only did the defendant have this proposition submitted to opposing counsel, but on some material which he gave to Dr. Geist, his own psychiatrist, over his own signature, he attached the following note:

> "Dear Dr. Geist,
> I have written Bob Sutton my proposal for an out-of-Court settlement. If you're interested in my terms regards Suzy, please request a copy of my letter from Bob.
>
> Regards,
> W. Wagner"

The fact that the defendant not only did not want to conceal the existence of such an outlandish proposal, but actually wanted a psychiatrist to see it, demonstrated that his contact with reality is precarious.

It is my further comment on this subject that in disclosing the existence of such a ridiculous idea to opposing counsel, Mr. Sutton, the attorney for the defendant, shows a serious lack of judgment. I cannot conceive of any at-

torney who would not point out to a client the absolute unreality of such a proposal, and would not part company with a client who insisted upon enunciating such a proposal. This litigation has lasted for too long a time, and both parties must have suffered very real torture. The subject of visitation has become, what the French refer to as "idee fixee" with the defendant, and refusing visitation has become "idee fixee" with the plaintiff.

It is my finding that the denial of the right of visitation by the Family Court Commissioner, by Judge Ahlgrimm, and by this Court to date, have been entirely proper considering the facts available as the case unfolded, and the horrible nature of the charges made. Anyone who would have acted differently then the Family Court Commissioner and Judge Ahlgrimm acted, would be subject to severe criticism in my opinion. The defendant's own acts caused him to be deprived of visitation with his child during the pendency of this action. His deprivation was caused by his own misconduct, and was prolonged by the bull-necked attitude of himself, and his present counsel. Having reached the conclusion that the activities complained of by the mother were part of the defendant's course of cruel and inhuman treatment toward the plaintiff, and that the defendant was not what is commonly called a sexual pervert, I find that he may safely be given visitation rights in the future, under certain conditions. First of all this must be handled with great delicacy so that the child is not injured. To date she appears to be a happy, healthy youngster, possibly somewhat dependent on her mother, but in general well adjusted. It may be said that the plaintiff is doing an excellent job of rearing the child, considering the handicaps she has worked under.

Decision

This situation must not be fractured, and the transition must be smooth, gradual and as free of tension as possible. My reason for granting the visitation are that once a divorce has occurred, the prime motivation for cruel behavior by the defendant toward the plaintiff will disappear, particularly as time passes. I am satisfied that if his motivation to hurt his wife is removed, that his relations with his daughter will become normal. Secondly, so much attention has been focused on this situation, that I am sure that the defendant would lean over backward in his contacts and actions with his daughter to prevent them from being misunderstood.

The Court calls attention to the fact that although Dr. Geist and Dr. Fredenthal have both called attention to serious emotional problems in the defendant, he has apparently done nothing whatsoever to secure counseling from either of these men, and appears to be unaware that he is in need of help. The Court formed a favorable impression of Dr. Geist, and it is the Court's order and requirement and condition that the defendant must consult with Dr. Geist for a period of six months to learn to understand himself, and the nature of his emotional problems. When this has been done, and Dr. Geist so reports to the Court, and indicates that visits may commence, the Court will make proper orders to give the defendant rights of visitation with the daughter of the parties. These probably will be controlled visits, at least at first, but as the child gets older, it may very well be that different arrangements may result. The Court is also aware that Mrs. Wagner, the plaintiff, is in need of counseling to understand the situation as it will develop in regard to the subject of visitation. The Court directs she consult some-

one from the Schroeder or Bacon Clinic at her choice, for counseling and guidance, and that before the arrangements are completed for visitation, she have one conference with Dr. Geist, in the presence of the defendant, and that likewise the defendant shall participate in one conference with Mrs. Wagner's psychiatrist or psychologist prior to the visitations. The Court foresees some difficulties and anguish in making the initial arrangements, but believes it is capable of being worked out so that the tension will gradually ease in the future. The Court will schedule a hearing on the subject of visitation arrangements in June or July of 1973, upon receiving advice from Dr. Geist and Mrs. Wagner's psychiatrist that arrangements are substantially complete. If difficulties arise as to preliminary steps, the Court will resolve these matters upon presentation by motion. In the meantime, and until changed by the Court, as indicated above, there will be no visitation by the defendant. The Court has not considered any of the contents of Defendant's Exhibit "W" in reaching its conclusion, this being the affidavit of Barbara Ann Ristine, former wife of the defendant. The Court has received Defendant's Exhibits "B" through "G", has settled the question of Mr. Fetek's testimony by requiring it to be presented, and believes it has ruled on all disputed questions of evidence. In the event that some have been overlooked, counsel may bring these to the Court's attention by motion in order that the record in this case will be as complete and accurate as possible, in as much as the Court anticipates the possibility of appeal and further litigation. The Court awards to the plaintiff such items of household goods, furniture, furnishings and personal belongings as are presently in her possession. That includes her Sunbeam automobile, if this is still owned by her. The Court

awards to the defendant his Volkswagen automobile and such items of household goods, furniture, furnishings, and personal belongings as are in his possession. If there are some items not covered by this general award, the parties may present their claims by motion so that the record will be complete on this subject also. The Court awards to the plaintiff real estate purchased by herself and her brother, and any proceeds thereof presently in her possession. The Court awards to the defendant the property in Minnesota and any proceeds accruing to him from the sale thereof. This property division is made as a final division of the estate of the parties, and in lieu of all alimony, leaving out the question of arrearages. The Court awards the plaintiff judgment against the defendant in the amount of $3,340, representing arrearages accruing in temporary alimony and support money required by prior orders of the Court. It appears that the defendant, although being seriously in arrearage on payments required by prior orders of the Court, has spent money freely for legal expenses. The Court feels that most of the burden for this protracted litigation falls upon the defendant, and therefore, the Court orders that 75% of the attorney fees for the plaintiff be paid by the defendant, and judgment be entered accordingly in the amount of $3,779.55.

The question of compensation for the guardian ad litem has not been argued or discussed to any extent and neither has the question of who should pay for the transcription of the proceedings had in this case before Judge Ahlgrimm. The appointment of the guardian ad litem was unquestionably proper and the Court feels that Mr. Chris-

tensen rendered valuable services in the case. The matter of Mr. Christensen's compensation and the source of payment thereof, and the transcripts, and any other unresolved matters alluded to in this opinion, or omitted inadvertently from this opinion, will be heard, considered and ruled on at a hearing to be held before the Court on some convenient evening session during the week of January 25, 1973, and the Court will conduct a pretrial hearing on all unresolved matters, rulings and incidental problems at 7:30 P.M., January 22, 1973, in the courtroom, during which pretrial hearing a schedule will be set up for hearing and disposing of all matters, including the imperfection and completion of the record in this case.

Counsel for the plaintiff may prepare findings and judgment in accord with this opinion, submit them to counsel for defendant, and to the Court for final approval.

After the supplemental proceedings, supplemental findings and a supplemental judgment will be prepared.

Dated at Racine, Wisconsin this 22nd day of December 1972.

By The Court:

Richard G. Harvey
Judge

Proposal of Findings and Conclusions

PROPOSAL OF FINDINGS AND CONCLUSIONS

(Received May 10, 1973)

(Letterhead of Kolbe, Sharp & Arena)

May 9, 1973

Honorable Richard Harvey
Racine County Courthouse
Racine, Wisconsin 53403

RE: Wagner -vs- Wagner

Dear Judge Harvey:

Enclosed herein is the original Findings of Fact and Conclusions of Law and the original and two (2) copies of the Judgment with regard to the above matter. Lastly, we are enclosing herein a certificate for the Clerk's signature.

On April 24, 1973, I sent copies of the Findings and Judgment to opposing counsel and to the guardian ad litem and I requested that should there be any objection to the Findings or Judgment that such objection be made within ten (10) days. I further indicated that if no objection was made within ten days, that I would assume there was no objection to the form of the Findings or Judgment.

Upon re-reading the Judgment and Conclusions, I noticed in Paragraph Eighth that I inadvertantly left out the phrase "of visitation". Accordingly, I added said phrase after the phrase "on the issue" so that the statement, in effect, is as follows: ". . . upon a receipt of a medical report by Dr. Geist giving his recommendations on the issue of visitation . . ." I trust that the addition of said two words is agreeable by all parties herein.

It would be appreciated if you would sign the Findings and the Judgment and have the same filed. I am sending a copy of this letter to the attorneys for the Defendant and the guardian ad litem for their records.

Very truly yours,

Duane L. Arena

DLA/cll
Enclosures

NOTICE OF ENTRY OF JUDGMENT
(Received May 23, 1973)

(Letterhead of Kolbe, Sharp & Arena)

May 22, 1973

Samson, Freibert, Sutton
& Finerty
Attorneys at Law
710 North Plankinton
Milwaukee, Wisconsin

RE: Joyce Ann Wagner -vs- Willard Dale Wagner

I am enclosing herein a copy of the Notice Of Entry Of Judgment with regard to the above entitled matter. Please be advised that the same is being served upon you by Affidavit Of Mailing.

Very truly yours,

Duane L. Arena
Duane L. Arena

DLA/cll
Enclosure

PETITION FOR EXTRAORDINARY WRIT

August Term, 1973

STATE OF WISCONSIN : IN SUPREME COURT

WILLARD WAGNER,

Petitioner,

vs.

COUNTY COURT OF RACINE COUNTY, Branch 4, Richard C. Harvey, Judge, and JOYCE ANN WAGNER,

Respondents.

(Filed August 30, 1973)

PER CURIAM. Willard Wagner has petitioned this court for a writ to commence an original action of habeas corpus or mandamus against the county court of Racine County, branch number 4, and Richard C. Harvey, Circuit Judge, presiding, on the ground the petitioner has a constitutional right to visit his daughter, which has been denied him. Willard Wagner was the defendant in a divorce action pending in the county court of Racine county during which time the exercise of his right to visit his child was denied. In the decision of December 22, 1972, the trial court explained the reasons why the exercise of the right of the father Willard Wagner to visit his child was to be denied for an additional six months and laid certain conditions upon both Mr. Wagner and Mrs. Wagner which

should be complied with prior to the exercise of visitation rights by Mr. Wagner with his daughter who is allegedly now approximately five years of age.

Shortly before filing this petition, Mr. Wagner filed an appeal in this court which raises the question of the reasonableness of the limitations on the exercise of his right of visitation with his daughter. This court considers the trial court has not denied the existence of a visitation right, constitutionally grounded or otherwise, of Mr. Wagner to visit his daughter but has placed certain conditions upon the exercise of that right. We are informed on oral argument that Mr. Wagner has refused to comply with those conditions. The propriety of the trial court's action in this respect is the subject matter of the appeal which will afford Mr. Wagner ample remedy to raise the issue he seeks to raise by this original action.

If Mr. Wagner considers himself aggrieved pending appeal, he may apply to this court for temporary relief.

There being an adequate remedy by an appeal, the motion for a writ to commence an original action of habeas corpus or mandamus is denied.

NOTICE OF PAGING OF THE RECORD

SUPREME COURT OF WISCONSIN
Office of Clerk
Madison, Wisconsin
August Term, 1973

Date October 25, 1973

No. 463

Gentlemen:

Joyce Ann Wagner,

Respondent,

v.

Willard Dale Wagner,

Appellant.

Please take notice that the record in the above cause has been filed this date. See Rules 251.29 and 251.43.

Robert O. Uehling, Clerk

To: Kolbe, Sharp & Arena
Attn: Duane L. Arena
Racine

Samson, Freibert, Sutton
& Finerty, Milwaukee
Attn: Robt. E. Sutton

Einer Christensen
Guardian ad litem for
Suzanne Wagner, Racine

(copy sent to Wagner 10/26/73)

DECISION OF SUPREME COURT OF WISCONSIN

Office of the Clerk
SUPREME COURT
State of Wisconsin

Robert O. Uehling
Clerk

Madison, November 27, 1973

To Kolbe, Sharp & *Arena*
Attorneys at Law
212 - 5th Street
Racine, WI 53403

Samson, Friebert, *Sutton* & Finerty
Attorneys at Law
710 No. Plankinton Avenue
Milwaukee, WI 53203

Mr. Einer Christensen, g/a/l
727 Wisconsin Avenue
Racine, WI 53403

Sir:—The Court today announced decision in your case as follows:

Joyce Ann Wagner v. Willard Dale Wagner, #463

Pursuant to order to show cause herein, after hearing counsel on November 21, 1973, including the guardian *ad litem,*

It Is Ordered that no showing having been made for the granting of temporary relief as prayed for in motion of appellant's counsel, such relief is denied.

Respectfully yours,

Robert O. Uehling
Clerk of Supreme Court

Supreme Court, U. S.
FILED
JUN 27 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1447

WILLARD WAGNER,

Petitioner,

vs.

JOYCE ANN WAGNER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DUANE L. ARENA
212 Fifth Street
Racine, Wisconsin 53403
Attorney for Respondent

HAMMERSMITH-BEESTHAUPT PRINTING CORP., MILWAUKEE, WIS.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. ....

WILLARD WAGNER,

Petitioner,

vs.

JOYCE ANN WAGNER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Has Petitioner exhausted all available remedies prior to his appeal?
2. Has Petitioner forfeited his right to appeal?
3. Is a natural father's right to visitation subservient to the best interests and welfare of his infant daughter?

SUPPLEMENTAL STATEMENT OF FACTS

Seven (7) doctors and psychologists testified in the Trial Court. Most, if not all of said experts, stated the Defendant was suffering from different degrees of mental illness. Allegations were made that the Defendant attempted sexually perverted acts with his three year old daughter. The alleged acts ranged from attempted sodomy to the fondling of the child's vagina.

REASONS FOR DENYING THE WRIT

I. Petitioner has an adequate remedy in the State Court to obtain visitation.

The Trial Court decided that the petitioner suffered from serious emotional problems. (P. App. 35) Such finding was made after two (2) psychiatrists (Dr. Bacon and Dr. Geist), two (2) psychologists (Dr. Ciotola and Dr. Fredenthal) and two (2) pediatricians (Dr. Henken and Dr. Graf) stated their various opinions about the welfare of the child of the parties and the mental condition of the petitioner. All (with the exception of Dr. Henken and Dr. Graf), within various degrees stated the petitioner was emotionally ill.

The Court decided that the petitioner was in need of professional help and that after six (6) months of consulting his pyschiatrist, the Court would give the petitioner visitation rights. (P. App. 35)

In other words, if the petitioner so chose, he could have had visitation on or about June 22, 1973.

Petitioner, however, decided to ignore such opportunity and apparently decided to petition various forums for

relief. Incidentally, such opportunity still exists and is available to the petitioner at any time he sees fit.

Accordingly, it is difficult to comprehend petitioner's argument that he has been denied due process especially when a trial was held, testimony was presented and a decision was rendered based upon the evidence submitted at trial.

It is axiomatic that the petitioner must exhaust all available remedies before he will be permitted such relief in the Supreme Court.

No argument has ever been presented why the petitioner refuses to seek psychiatric help, especially when such help would ultimately give him the visitation rights he languishes for.

II. Petitioner's rights, if any, have been forfeited by failing to timely appeal his cause to the Wisconsin Supreme Court.

Petitioner fails to relate to this Court that the reason his appeal to the Wisconsin Supreme Court was denied was because he failed to appeal within the time prescribed by law.

It would seem a travesty of justice to allow a petitioner who wrongfully allows the appeal time to expire in the state forum to then argue his constitutional rights were violated because the state appellate court refused to accept his appeal.

Yakus v. United States, 321 U.S. 414, 88 L. Ed. 834, 64 S. Ct. 660, stands for the proposition that a constitutional right may be forfeited by the failure to make a timely

assertion of the right before a tribunal having jurisdiction to determine it.

III. Parental right of visitation is not an absolute right but must yield to the best interest and welfare of a child.

The issues of visitation and custody were tried in the Family Court of Racine County. Testimony was received concerning the alleged perverted and sadistic acts of the petitioner. Numerous doctors expressed their opinions as to the petitioner's psychiatric condition as it relates to the child's best interest and welfare.

The Trial Court determined in effect that the petitioner could only visit the child *after* he obtained psychiatric help.

24 Am. Jur. 2d p. 991 states "In determining whether the parent who does not have custody of a child should be given visitation rights, it is held that the welfare and best interests of the child are the primary consideration."

Said digest on page 912 states "The fact that a parent has been cruel to his children and therefore may be expected to treat them cruelly during visits may be a sufficient ground for denying visitation rights."

The Wisconsin Supreme Court in *Neblett v. Neblett,* 274 W. 574 (1956) and *Block v. Block,* 15 W. 2d 291 (1961) has ruled that a parent's right to visitation must yield to the child's best interests and welfare (*Block* p. 298 and *Neblett* p. 578). In *Neblett,* the Court stated on page 578 ". . . the trial court would have been remiss in its duty to allow visitation without taking precautionary measures of the nature contemplated in the judgment.

The primary consideration of the court being the welfare of the children and the findings fully supporting the judgment that defendant have no right of visitation, it is for the defendant, if he desires to visit his children, to show that such visitation will be in their interests."

CONCLUSION

Petitioner had all issues concerning custody and visitation litigated; he has refused to follow the Trial Court's judgment which would have allowed visitation and accordingly, certiorari should be denied.

Respectfully submitted,

DUANE L. ARENA
212 Fifth Street
Racine, Wisconsin 53403
Attorney for Respondent